SOME RECENT DECISIONS UNDER THE WORKMEN'S COMPENSATION ACTS OF MASSACHUSETTS AND MICHIGAN.

II.

Those drafting many of the American workmen's compensation acts, including those of Michigan and Massachusetts, have copied with but slight changes many of the definitions contained in the English Acts of 1897 and 1906. Among the phrases so copied are those defining the injuries which are the subject of compensation and the species of misconduct which bars the recovery of compensation by an injured employee or his dependents. In the first, the requirement that the injury shall "arise out of the employment" is directly copied from the English Acts; similarly in the second, it is stated that the servant shall be denied compensation if his injury is caused "by his serious and willful misconduct." It is not claimed by those drafting these acts that these phrases in themselves convey to the ordinary mind any very definite idea of their meaning, or that they have received any clear construction in any other field of law by the courts of those jurisdictions in which the acts are to take effect. The reason generally given for their adoption is that such courts will, in construing them, have the advantage of the precedents established by the decisions of the British and Colonial courts.

This assumes that American courts will, in construing the language so copied, follow the English precedents, for only so would the adoption of these phrases make for certainty. If these precedents are constantly ignored or rejected as authority, they will have no influence one way or the other. But if they are sometimes followed, sometimes rejected as inapplicable, their existence will merely add a new element of uncertainty in every case. For in addition to the question as to what the English precedents determine under the facts in a given case, the further question must also arise whether the court will or will not follow them.

Secondly, it assumes that the English courts have evolved a construction not only clear and definite, and as such applicable to the facts of any given case, but also one which, when so applied, carries into effect the object which such acts are intended to accomplish.

The most important of the phrases so copied deals with the causal connection between the employment and the injury. It first appeared in the English Act of 1897, which provides that a workman is entitled to compensation "if personal injury . . . arising out of his employment . . . is caused to him." This definition is repeated verbatim in the Act of 1906. It is held that the words "is caused" relate to the connection between the accident and the injury, and that it is enough that the injury in fact resulted from the accident even though it might not be possible to foresee in advance that such a result would follow.[11] On the other hand, the words "arising out of the employment" are said to point to the origin or the cause of the accident and relate to the connection between the employment and the accident.[12]

The Act of 1906 was restricted to certain ultra-hazardous trades and employments. In defining the causal connection between the employment and the injuries to be compensated by such an act, there were several possible alternatives. At one extreme, the act might well give compensation only for such injuries as were due to that excess of danger in the particular employments covered which, in contrast to those not included, gave them their ultra-hazardous character.[13] If this were done the act would carry into the relation of master and servant the principle already recognized by many English cases, that a person carrying on an ultra-hazardous enterprise or putting his land to an extraordinarily hazardous use does so at his own and not at his neighbor's risk. Thus a new and peculiar penalty or burden would be placed upon those carrying on such trades, and a new and peculiar protection would be given to the economic status of those employed therein. On the other hand, the act might carry to its logical result the theory, usually given as that upon which such legislation is based, that the product is to be made to bear as part of its cost of production the burden of repaying at least a part of the harm that is caused to the human instrumentality or tools that are employed in producing it, and so might give compensation for any injury in fact caused to the workman by his connection with its production, requiring only that the sufferer's employment in producing the article should be *causa sine qua non*, it being immaterial what the active

[11]See 25 Harvard Law Rev. 517-519.

[12]Buckley, L. J., in Fitzgerald *v.* Clarke & Son [1908] 2 K. B. 796; Loveburn, L. C., in Moore *v.* Manchester Liners [1910] A. C. 498-500.

[13]Some such idea appears in the opinion of Lord Traynor, in Falconer *v.* London & Glasgow Engineering Co. (1901) 3 Sc. Sess. Cas. 564.

cause might be if his employment brought him into contact with it. Either of these two extremes would seem logical and appropriate to carry into effect the general object of such legislation or to make effective the selection of particular employments as those which alone should bear the burden of giving compensation. Either would furnish a test easily applicable to the sort of accident usually occurring in such trades. But unfortunately, instead of using language clearly defining what causal connection between the injury and the employment Parliament deemed necessary in order to entitle the sufferer to compensation, the phrase used, "arising out of the employment," while capable of being construed as expressing either of these two extremes, was equally capable of any other construction which happened to strike the court construing the Act as desirable. Both British and Colonial courts have from the beginning held that, while it is not necessary that the accident should be due to one of the peculiar dangers which gives the employment its ultra-hazardous character, something more is required than that it in fact resulted from such employment. It is not enough that the employment was itself the *causa sine qua non* of the accident.[14] They have required that it shall result from a risk[15] capable of being foreseen as a usual incident to the particular employment in which the sufferer was engaged when he was injured.[16] Thus they have adopted a middle course conforming to no theory which, as far as the writer knows, has as yet been suggested as underlying such legislation. Nor did the courts at the time when they first adopted this construction seem to have any definite idea in mind; they acted with the opportunism inherent in common law procedure and dealt with each case as it arose, adopting therein such a construction as the facts immediately before them seemed in justice, as they saw justice, to require, not attempting a complete definition to cover all cases. Behind their

[14]See Cozens-Hardy, M. R., in Craske *v.* Wigan [1909] 2 K. B. 635-638.

[15]It is the existence of risk, not the injury, which must be capable of being foreseen. "It is enough that the employer knows that there exists in the business the situation which gives rise to the accident." 25 Harvard Law Rev. 525; Rowland *v.* Wright [1909] 1 K. B. 963.

[16]This is first intimated in England in Armitage *v.* L. & Y. Ry. [1902] 2 K. B. 178, and is stated in Challis *v.* London & S. W. Ry. [1905] 2 K. B. 154; but it is not until after the passage of the Act of 1906, extending compensation to all employments, that the foresight of the parties involved, the master and employee, is finally and definitely made the test. Morrison *v.* Clyde Nav. Trustees [1909] Sc. Sess. Cas. 59; Collins *v.* Collins [1907] 2 Ir. 104, 108; McDaid *v.* Steel (1911) 48 Sc. L. Rep. 765, 767; and see Rowland *v.* Wright [1909] 1 K. B. 963, and 25 Harvard Law Rev. 519-523.

action may, however, be said to lie the instinct,—for it is not sufficiently expressed to be called a definite conception,—that where action is voluntary and not obligatory, the individual when he chooses to act or refrain from action, should have the opportunity of intelligent choice with at least the means of knowing the consequences which that choice would entail, and therefore, that one who elects to carry on a trade should not be burdened with responsibilities for injuries to those associated with him, other than those injuries which he could foresee that the association might probably involve.[17]

Thus they have introduced as determinative of the right to compensation that most uncertain factor, the foresight of that ideal creature "the reasonable man." Wherever the mental attitude of a party becomes legally important, more particularly where it is a mental attitude in which he ought to have been rather than one in which he was, its existence must be, as Lord Penzance said in *Dawkins* v. *Lord Rokeby*,[18] an open question "upon which opinions may differ and which can only be resolved by the exercise of human judgment." It is impossible to prove what an individual actually foresaw, and likewise what he, as a reasonable man, ought to have foreseen, by "any process of demonstration free from the defects of human judgment." It certainly can not be shown by the mere proof of the external facts, which as such are capable of accurate perception and faithful reproduction by witnesses thereto, subject only to such inaccuracies as are inevitably inherent in the personality of such witnesses. A further operation is necessary. Some person or persons, court, jury or board, must exercise "human judgment;" they must decide whether under circumstances so proved the defendant did foresee the risk, or, if he in fact did not, whether he ought to have done so. Except where controlled by binding precedent upon practically identical facts, the judgment of such a body as to what an individual in fact foresaw must at best be based upon its experience and common sense; and where the question involves a determination of what the party ought to have foreseen, it requires in addition the definition of a standard of duty, a determination of how the party's mind ought to have

[17]Together with this conception is the idea, perhaps involved in it, that the employer must be allowed the right to manage his business as he pleases, and shall not be subject to any risk of liability arising outside the confines of a definite scheme of work which he may prescribe in advance.

[18](1875) L. R. 7 H. L. 744.

reacted to such of the actual facts as it may be determined that he ought to have observed or discovered.

What the decision will be can be predicted with certainty in only the most simple cases. Where the situation is at all unusual, the circumstances at all complex, it would require a bold psychologist to predict the reaction of the tribunal's mind to the proven facts. After years of litigation some aid may be obtained from precedent. There may be a ruling upon substantially identical facts. Some hint as to the tendency and mental attitude of the tribunal may be obtained from its prior decisions on facts approximately similar to those of the case in hand. But, in most instances, certainty cannot be obtained till the facts of each case are submitted by litigation to the final tribunal and its opinion is authoritatively expressed by a ruling or judgment. In Great Britain and its colonies this phrase, so construed, has proved a fertile field for wasteful litigation, which it is admittedly the primary object of such acts to prevent.[19]

From the requirement that the accident must be due to a risk foreseeable as an incident of the employment, the English courts have deduced, *inter alia,* two subsidiary rules: (1) Only those injuries due to risks peculiar to the employment are within the terms of the Act;[20] and, (2) that an injury also falls outside the Act if it results from a risk which the employee has, as they say, superadded to the dangers of the work as performed in accordance with the system ordained by his employer, by his deliberate choice for personal reasons of some other method.[21]

The courts have not, however, worked out any definite standard by which to determine whether the injury is peculiar to a business. The term "peculiar" involves a comparison of the risks of

[19]The tendency of the introduction of the ideal foresight of the reasonable man, as determinative of liability, to create uncertainty and its inevitable consequence, litigation, is clearly shown by the multitude of cases yearly reported in every volume of state reports on the question of proximate cause in actions of negligence. No practicing lawyer who has any experience in such litigation, no student who has read the opinion of the courts, and marked the difficulty which even the ablest judges have experienced in working out results satisfactory to themselves, and noted the contrary decisions of the same tribunals upon closely similar facts, will hope that such a test will check rather than foster litigation.

[20]Andrew *v.* Failsworth Industrial Soc. [1904] 2 K. B. 32; Craske *v.* Wigan [1909] 2 K. B. 635-638; Warner *v.* Couchman [1911] 1 K. B. 351; Pierce *v.* Provident Clothing Co. [1911] 1 K. B. 997, 1003; Chitty *v.* Nelson (1908) 126 L. T. J. 172; Kelly *v.* Kerry County Council (1908) 42 Ir. L. T. 23; Amys *v.* Barton (Eng. C. A. 1911) 105 L. T. 619.

[21]See cases cited in notes *27, 28* and *29, post.*

the particular employment with something else, but the cases do not define, except negatively, what that something is. The decisions clearly indicate that it is not a comparison with other businesses covered by the Act, so that the risk must be one only encountered in that particular employment.[22] Nor in every case is the comparison with the risks encountered by persons not employed at all, for in many cases compensation is granted for injuries arising out of risks which every one, whether employed or not, must encounter in his daily life.[23] There is some intimation that where the risk is one common to every-day life the employment must subject the workmen engaged therein to that risk with peculiar frequency[24] or to a greater degree,[25] but how much more frequently or to how much greater degree they do not indicate. There is a distinct intimation of one distinction which, in its nature, seems altogether arbitrary and illogical. This is the distinction between risks of injury from purely natural causes, such as cold, heat, etc., and risks of injury from the perils incident to the con-

[22]See Fletcher Moulton, L. J., in Warner *v.* Couchman [1911] 1 K. B. 351, 357: "The law does not say 'arising out of his employment and out of that employment only.' Other employments have nothing whatever to do with the question."

[23]See the supposititious case of a servant going out to post a letter and being injured in the street, put by Cozens-Hardy, M. R., in Pierce *v.* Provident Clothing Co. [1911] 1 K. B. 997, as one of clear liability; also see M'Neice *v.* Singer Sewing Machine Co. [1911] Sc. Sess. Cas. 12.

[24]See the comparison of the risk of collision run by an ordinary traveler and a railway guard, made by Cozens-Hardy, M. R., and his explanation of M'Neice *v.* Singer Sewing Machine Co., in his opinion in Pierce *v.* Provident Clothing Co. [1911] 1 K. B. 997, 999, 1003; but note that in M'Neice's Case Lord Dunedin does not base his decision on the greater frequency of the claimant's exposure. See 25 Harvard Law Rev. 534-535.

[25]It seems impossible upon any such distinction to reconcile the refusal of compensation to a sailor whose hands were frost-bitten while pulling upon ice-covered ropes in Halifax, Karemaker *v.* S. S. Corsican (C. A. 1911) 4 Butterworth, Workmen's Compensation Cases, 295, with its allowance to a ship-painter who was sunstruck while painting a ship in dry-dock in the tropics, Morgan *v.* S. S. Zenaida (1909) 25 T. L. R. 446. Nor does a workman at work on a six foot scaffold, Andrew *v.* Failsworth Industrial Soc. [1904] 2 K. B. 32, seem to be exposed to such a greater risk of being struck by lightning than is a road mender, required as such to remain out of doors during a violent storm, Kelly *v.* Kerry County Council (1908) 42 Ir. L. T. 23, as to render it right to grant compensation to the former when struck and deny it to the latter. While all persons whose business or pleasure calls them abroad on a very cold day run some risk of having their hands frost-bitten, it would seem that the risk is very palpably increased in the case of a person whose employment constantly requires him to take off his gloves to make change for customers; but in such a case compensation has been refused Warner *v.* Couchman [1911] 1 K. B. 351, 357.

ditions of civilized life, such as the risk of being run down by traffic or of stumbling upon a pavement.[26]

The course of English decisions upon the second point is particularly unfortunate. The earlier cases held that where a servant, to serve some private purpose of his own, such as to enable him to accomplish some personal end while doing his master's work[27] or to save himself trouble in doing it,[28] adopts a method not necessary to accomplish the task set him, and because of such method an accident occurs, he is barred from compensation, the risk being said to be one superadded by him and not inherent in the employment. These cases drew a distinction between a deviation by the employee from the method of work prescribed by his master consciously done for some purpose of his own, and a deviation under the mistaken idea that such departure from his orders would be to his master's interests,[29] it being held that in an emergency, where the master's property or business is suddenly confronted with a peril, the servant may, without forfeiting his right to com-

[26]*Cf.* Kelly *v.* Kerry County Council (1908) 42 Ir. L. T. 23; Warner *v.* Couchman [1911] 1 K. B. 351, 357; and Karemaker *v.* S. S. Corsican (C. A. 1911) 4 Butterworth, Workmen's Compensation Cases, 295; with M'Neice *v.* Singer Sewing Machine Co. [1911] Sc. Sess. Cas. 12; and Pierce *v.* Provident Clothing Co. [1911] 1 K. B. 997.

[27]As in Clifford *v.* Joy (Ir. C. A. 1909) 43 Ir. L. T. 193, where a servant girl having washed her hair and called to the kitchen to watch a baby. In order to dry her hair more quickly, she sat on the side of the cradle nearest the fire; her dress caught fire and she was burned.

[28]Revie *v.* Cummings (1911) 48 Sc. L. Rep. 831, where a workman, to save exertion, instead of walking by the side of trucks drawn by a traction engine rode on them, and in jumping down to apply the brakes, fell under the wheels; McDaid *v.* Steel (1911) 48 Sc. L. Rep. 765, where an errand boy was injured while using an elevator to save himself the trouble of walking upstairs. See, also, cases cited in 25 Harvard Law Rev. 422, note 57.

[29]Tobin *v.* Hearn [1910] 2 Ir. 639, with which compare Cronin *v.* Silver (1911) 4 Butterworth, Workmen's Compensation Cases, 221, and Furniss *v.* Gartside (1911) 4 Butterworth, Workmen's Compensation Cases, 411. This distinction is even more clearly brought out when the servant departs from the ambit of the task set him by his employer, so completely that, if such departure were for his own purposes and not to serve his master's interest, he would thereby put himself outside of his employment. Goslan *v.* Gillies [1907] Sc. Sess. Cas. 68; Rees *v.* Thomas [1899] 1 Q. B. 1015; Harrison *v.* Whittaker Bros. (1899) 16 T. L. R. 108; London, etc. Co. *v.* Brown [1905] Sc. Sess. Cas. 488; Yates *v.* South Kirkby, etc. Collieries [1910] 2 K. B. 538; Hapelman *v.* Poole (1908) 25 T. L. R. 155; all cases where the employee was injured in preserving his master's property, or in rescuing some person from injury for which the employer would have been liable. See Mullen *v.* Stewart & Co. [1908] Sc. Sess. Cas. 991, where compensation was denied, since the injury was sustained in an effort to save the master's property from peril to which the injured man's own misconduct had exposed it. As to injuries sustained while protecting an employer from a personal attack, see Collins *v.* Collins [1907] 2 Ir. 104, 108.

pensation, depart from the pre-ordained system. Thus the right to compensation is made to depend upon the fidelity of a workman to his master's orders or at least to his interests,—in a word, upon his merit or demerit as servant. It is true that neither the defense of contributory negligence nor of voluntary assumption of risk are thus definitely re-created; but the employee's right to compensation is forfeited if he is at fault, though the fault is perhaps a new one not hitherto known to the English law, being the breach of the servant's duty to serve his master faithfully and obediently with an eye single to his interest. This duty, while always regarded by the employing classes as socially existent, has never before received legal recognition. A late decision of the House of Lords,[30] however, has put the employee in even a worse position by holding that the choice of an unnecessarily dangerous method of doing the work, though not dictated by any selfish interest of the servant, bars him from compensation, and that he can only recover if he is doing the work in the way the master has ordered it to be done, or at least in a way of which the master, were he present, would, in the court's opinion, approve.

In four recent cases, two in Massachusetts and two in Michigan, the court was called upon to construe phrases directly copied from the English Acts. In all of them the phrase "arising out of the employment" required construction and application to the facts. In the two Michigan cases the court was also obliged to determine whether the accident occurred in "the course of the employment" and whether the workman was guilty of "serious and willful misconduct."

In *McNicol's Case*,[31] the court held that the decisions of English courts before the adoption of the Massachusetts Act were entitled to weight, and following those decisions determined that "the causative danger," or what the English decisions call the "risk," must be "peculiar to the work and not common to the neighborhood." It must be "incidental to the character of the business," and excludes an injury which comes from "a hazard to which the workman would have been equally exposed apart from the employment."[32]

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[30]Plumb *v.* Cobden Flour Mill Co. (1913) 109 L. T. 759.

[31](1913) 215 Mass. 497.

[32]They did not require, however, that the danger should have been foreseen or expected, but held that it sufficed if, afterwards, the injury appeared to have its origin in a risk connected with the employment.

In the later case of *Milliken* v. *Towle & Co.*,[33] it was held, applying this rule, that a dependent of a driver who, being seized with temporary insanity while driving his employer's wagon, had driven it far out of its appointed route into some fields in the country and, while endeavoring to find the road, had fallen into a marsh and subsequently died of pneumonia brought on by exposure, was not entitled to recover since there was nothing in the nature of his employment which made it likely that such an accident would occur.

In *Clem* v. *Chalmers Motor Co.*,[34] the applicant's decedent was employed in constructing a roof on a building twenty feet high. The weather being cold, the employer, to add to the comfort and efficiency of its workmen, served hot coffee to them at about nine or ten in the morning. On being notified that it was ready, the workmen descended to partake of it. All but three went down by a ladder, which was the usual means of access to and egress from the roof. The decedent, however, chose to descend by a rope held by two of his comrades, which reached within five or seven feet of the ground. Nobody saw him after he disappeared over the roof until he was picked up on the ground beneath, having sustained injuries from which he died.

The Michigan court, McAlvay, J., dissenting, held that the injury "arose out of the employment" and that the decedent was not guilty of "willful and intentional misconduct." The language used by the court seems to indicate that nothing done by the employee will be construed as such misconduct unless in doing the act "he intended or expected to be hurt."[35] The court's construction of all the phrases copied from the English Acts is thus much more favorable to the applicant than the construction put upon them by the British courts. But if the case had come up in England it would

[33](Mass. 1914) 103 N. E. 898.

[34](Mich. 1914) 144 N. W. 848.

[35]By so construing this provision they make it in effect practically the equivalent of the provisions in many other acts, notably those of New Jersey and New York, which deny compensation for injuries "brought about and occasioned by the willful intention of the injured employee to bring about the death of himself or another." The only distinction which can be drawn,—between the employee's intention to injure himself and his doing an act from which he definitely expects injury to result,—is in practice more apparent than real. Whether compensation should be denied only where the injury is intentionally self-inflicted, or whether willful misconduct should also be a bar, is a very delicate and difficult question of policy; but certainly it is one to be determined by the legislature enacting such legislation rather than by subsequent judicial construction.

appear clear that, although under the terms of the English Act of 1906 the dependents of a deceased employee injured in the course of his employment are not barred from recovery by his willful misconduct, recovery would have been denied on the ground that the injury did not arise out of the employment, because it was not the result of any risk inherent in the work to be performed, but of one superadded thereto by the employee himself for his own convenience.

In *Worden* v. *Commonwealth Power Co.*,[36] the applicant was an old man who was employed by the Power Company in repairing and changing lights in its lighting system in the city of Jackson. In doing this work he used his own horse and wagon which he kept in his own barn. He had no stated hours of labor but had a certain circuit of lights to attend to. On the day in question, having finished his dinner, he went out to hitch up his team to start upon his rounds. On the way from his house to his barn he slipped and fell upon some ice which had accumulated upon the path and sustained the injuries in question. Under the English decisions it is very probable that he would have been denied relief on the ground that the injury was not received in the course of the employment since such employment had not begun.[37] The Board, however, regarded the question as to whether the accident arose out of the applicant's employment as decisive, and held that the risk of falling on ice, differing from that of falling from his wagon or receiving an electric shock, was one to which he was not peculiarly exposed by his employment. "On the other hand it may be stated that one of the most common risks to which the public is exposed is that of slipping and falling on ice, a risk encountered by the public generally, irrespective of their employment." The decision is somewhat qualified by the further statement that this is particularly applicable where the accident happens to the party injured when he is walking on his own premises.

Thus in the only two cases in which the phrase "arising out of the employment" has so far required construction in Massachusetts, the Supreme Judicial Court has recognized and followed the weight of British precedent; while the Michigan Court and Board

[36] A Michigan case reported in the National Compensation Journal, Vol. 1, No. 1, p. 31.

[37] It is there held that a workman's employment begins when he enters his master's premises by the usual or permitted ways for the purpose of beginning his labors, and does not terminate until he again leaves the premises. He is not in the master's employment while outside of such premises unless actually engaged in doing his appointed work.

has followed it in only one of the questions presented,[38] and that curiously enough the very one presented in the Massachusetts cases, while ignoring it on the other three points.[39] Their decisions on these three points show a marked tendency to adopt an interpretation of these terms, as used in their Act, more liberal to the employee than that placed by British courts upon identical language. But how much more liberal cannot be determined until every one of the more usual situations covered by their Act has been passed upon by the Supreme Court of the State, which is the final arbiter of the effect of the language used by the legislature. Thus the whole question of the construction of the language used in these Acts is left in the air, and no one dare predict what this extremely obscure phrase will come to mean when finally, after years of litigation, the Michigan court has hammered out for itself some more or less definite construction thereof.

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[38]The question whether the injury "arose out of the employment."

[39]The points referred to are (1) whether the injury was received "in the course of the employment," (2) what constitutes "willful and intentional misconduct," and (3) whether the Act covers disease as well as violent injury to the bodily structure. Since this article was written, the Supreme Court of Michigan has reversed the ruling of the Commission and has held that occupational disease is not subject for compensation under their Act. Adams *v.* Acme Lead Co. (Mich. 1914) 148 N. W. 485.